

MARKS & SOKOLOV CAN ASSIST IN OBTAINING BANK RECORDS AND OTHER EVIDENCE FROM THE UNITED STATES TO USE IN RUSSIAN AND OTHER FOREIGN COURT PROCEEDINGS

The U.S. offers a very powerful litigation tool to parties to Russian and other foreign court proceedings to obtain bank records, other documents and witness testimony from sources within the U.S., even if such evidence is unobtainable through the forum's own discovery procedures. The §1782 discovery process can be relatively quick, inexpensive, and efficient for obtaining crucial information to win a case.

I. What is 28 U.S.C. §1782?

Section 1782 is an American law designed to allow participants in pending and future foreign proceedings to obtain documents and testimony from sources located in the U.S., for use in their home proceedings. The applicant is not required to obtain Letters Rogatory from the foreign court or pursue discovery through the Hague Evidence Convention.

II. What Can Be Obtained?

Documentary and testimonial evidence including:

- International Wire Transaction Records (all U.S. Dollar wires transit through the U.S.)
- Emails, Correspondence, Phone and Travel Records
- Banking, Credit Card and Business Transaction Records
- Corporate Documents including Shareholder and Board Meeting Records
- Accounting, Employment and Intellectual Property Records
- Property and Real Estate Transaction Records
- Attorney Records (that are not subject to attorney-client privilege)
- Medical and Educational Records

If the discovery target is a corporation, in addition to being required to produce documents, it may be required to designate someone to testify on its behalf. For example, in one matter, the CEO of The Bank of New York was ordered to produce documents and appear for deposition for use in Russian litigation. In another matter, we obtained an order requiring Renova, Inc., a company controlled by Victor Vekselberg, to produce documents and present a witness for deposition in New York. Most recently, we obtained records from more than ten banks on behalf of a major Russian client.

III. What Will A U.S. Court Consider When Reviewing A §1782 Application?

A. Three Statutory Requirements Must Be Satisfied

First, the person from whom discovery is sought must reside or be found in the district of the federal court to which the discovery request is made.

Second, the information sought must be “for use in a proceeding in a foreign or international tribunal.” The term “for use” means anything that will increase the participant’s chance of

success. There is no requirement the evidence be admissible in the foreign proceeding.

Third, the application must be made by a foreign or international tribunal or an “interested person” with participation rights in a pending or contemplated proceeding. Parties to a pending or anticipated foreign proceeding may obtain evidence without foreign court approval.

B. Discretionary Considerations

If the statutory requirements are satisfied, the U.S. court is free to grant discovery in its discretion. These considerations are:

1. Whether the discovery target is a participant in a foreign proceeding or subject to the jurisdiction of the foreign tribunal

This factor weighs in favor of granting discovery when the discovery target is not a party to the foreign proceeding and the foreign tribunal has no jurisdiction over that party. For example, in one matter, the court noted assistance was necessary because the discovery target, the Chairman of The Bank of New York, was outside the reach of the Russian court's jurisdiction, and discovery from him would be unobtainable without the assistance of §1782.

2. The foreign tribunal's receptivity to U.S. judicial assistance

Section 1782 does not require the applicant to establish that the sought evidence is admissible in the foreign action. When examining this issue, rather than delving into the foreign tribunal's rules and legal traditions, U.S. courts will look for affirmative “authoritative proof” that the foreign tribunal would reject evidence obtained under §1782 such as a representative of a foreign sovereign expressly stating an objection. In one matter, the court declined to undertake a “speculative foray” to attempt to determine the extent to which a Russian court would be receptive to evidence gathered pursuant to discovery assistance under §1782.

3. Whether the request seeks to circumvent foreign proof gathering restrictions or other policies of a foreign country or the United States

This factor looks at the extent to which the foreign tribunal has rules or restrictions of its own limiting evidence gathering in a foreign forum. To decline a §1782 request based on foreign forum's foreign proof gathering restrictions, the U.S. court must conclude that the request would undermine a specific policy of the foreign forum or the U.S. Importantly, just because the foreign tribunal may limit discovery within its domain does not signal an objection to aid from U.S. federal courts. Section 1782 discovery is not limited to materials only discoverable in the foreign jurisdiction. Nor is there any requirement the applicant first seek discovery from the foreign tribunal.

4. Whether the requests are unduly intrusive or burdensome

Courts will exercise their normal gate keeping function to protect against abusive or harassing discovery requests and to protect confidential information. Courts have rejected arguments that requested discovery is burdensome if it requires translation or the documents are located abroad.